No. 86-854

In the Supreme Court of the United States

OCTOBER TERM, 1986

JEOFFREY ALLEN MEACHAM AND
DENNIS FRANKLIN LOZON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the provisions in the guilty plea agreements of three government witnesses requiring them to testify truthfully at trial were properly admitted during the direct examination of the witnesses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. la-7a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1986. A petition for rehearing was denied on September 26, 1986. The petition for a writ of certiorari was filed on November 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners were convicted of conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. 846. Both petitioners were sentenced to seven

years' imprisonment. The court of appeals affirmed (Pet. App. la-7a).

At trial, the government established that petitioners supplied cocaine in a series of transactions to two unindicted co-conspirators, Terrence and Ronald Levee, for distribution in the Baltimore area. A third unindicted co-conspirator acted as a representative of and courier for the Levees in some of the transactions. On several occasions, the parties met in Chicago, Salt Lake City, and Phoenix to exchange cocaine for cash payments. Pet. App. 2a; Gov't C.A. Br. 1-2.

Pursuant to plea agreements with the government, the three unindicted co-conspirators testified at trial about their respective roles in the transactions. On direct examination, the government asked each of the three witnesses about his plea agreement, including the provision requiring each to testify fully and truthfully at trials in which his testimony was relevant. Following the government's examination of each witness, the government offered the plea agreements into evidence. The district court admitted the agreements over petitioners' objections. Petitioners' counsel cross-examined each witness extensively about the possibility that the government might treat him more favorably because he had agreed to cooperate. Petitioners' primary defense at trial was that the Levees were merely lending them sums to aid a failing business. Pet. App. 2a; C.A. App. 81.

ARGUMENT

Petitioners contend (Pet. 3-4) that the government's introduction of the "truthful testimony" provisions of the plea agreements constituted improper vouching for the credibility of the three cooperating witnesses. The court of appeals correctly rejected petitioners' claim, and further review by this Court is not warranted.

1. The government engages in improper vouching when it places its prestige behind a witness through personal assurances of the witness's veracity, or when the government suggests that matters outside the record support the witness's testimony. See *Lawn* v. *United States*, 355 U.S. 339, 359-360 n.15 (1958). Contrary to petitioners' contention (Pet. 3), the government's introduction of a witness's promise to tell the truth contained in a plea agreement does not constitute improper vouching, because that promise is no different from the promise made by any witness when he is sworn to testify at trial. The purpose of introducing the "truthful testimony" provision of a plea agreement is not to vouch for the witness, but merely to refute the appearance that the cooperating witness is biased in favor of the government as a result of the benefits conferred in the plea bargain. For this reason, the courts of appeals uniformly agree that the government may introduce the terms of a guilty plea or immunity agreement, including the requirement that the witness testify truthfully, for purposes of rehabilitation after the defense challenges the credibility of a government witness who is testifying pursuant to such an agreement.[1] As the court of appeals held, the district court in this case properly admitted the truthful testimony portion of the plea agreements on direct examination, because it was "unmistakab[ly]" clear at that point that petitioners'

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[1]See *United States* v. *McNeill*, 728 F.2d 5, 14 (lst Cir. 1984); *United States* v. *Smith*, 778 F.2d 925, 928 (2d Cir. 1986); *United States* v. *Oxman*, 740 F.2d 1298, 1303 (1984), vacated on other grounds, No. 84-1033 (July 2, 1985), aff'd in part, and rev'd in part on other grounds, 774 F.2d 1224 (3d Cir. 1985), cert. denied, No. 85-994 (Mar. 3, 1986); *United States* v. *Henderson*, 717 F.2d 135 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984); *United States* v. *Leslie*, 759 F.2d 366, 378 (5th Cir. 1985), rev'd on reh'g en banc on other grounds, 783 F.2d 541, 542 n.1 (1986); *United States* v. *Townsend*, 796 F.2d 158, 162-163 (6th Cir. 1986); *United States* v. *Hedman*, 630 F.2d 1184, 1198-1199 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981); *United States* v. *Rohrer*, 708 F.2d 429, 432-433 (9th Cir. 1983); *United States* v. *Dennis*, 786 F.2d 1029, 1045-1046 (11th Cir. 1986).

counsel would challenge the credibility of the witnesses on cross-examination. See Pet. App. 3a.

2. Contrary to petitioners' claim, the decision in this case is not in conflict with the decisions of other circuits.

Petitioners first rely on two Ninth Circuit cases—*United States* v. *Roberts*, 618 F.2d 530 (9th Cir. 1980), cert. denied, 452 U.S. 942 (1981), and *United States* v. *Brown*, 720 F.2d 1059 (9th Cir. 1983)—to support their claim that the decision in this case is in conflict with the decisions of the Ninth Circuit. In neither *Roberts* nor *Brown*, however, did the Ninth Circuit rule that the truthful testimony provision of a plea agreement is inadmissible on direct examination. In *Roberts*, the Ninth Circuit overturned the conviction because the prosecutor, in his closing argument, improperly vouched for a witness by referring to facts outside the record. See 618 F.2d at 533-534. The court did not base its ruling on the government's introduction of the plea agreement. To be sure, the *Roberts* court suggested that the introduction of a plea agreement might in some contexts constitute improper vouching for the witness's credibility (see *id.* at 536), but the court did not address the question whether the terms of a plea agreement may be admitted to rebut arguments by the defense that the benefits of a plea agreement are likely to have prompted the witness to commit perjury. In subsequent cases, the Ninth Circuit has approved the practice of admitting a witness's plea agreement containing a truthful testimony provision after defense counsel has exploited the plea agreement to challenge the witness's credibility. *United States* v. *Rohrer*, 708 F.2d 429, 433 (9th Cir. 1983); *United States* v. *Tham*, 665 F.2d 855, 861-862 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982). From those decisions, it seems clear that the Ninth Circuit would permit the introduction of the truthful testimony provision of a plea agreement, even on direct examination, if, as in this case, defense counsel had clearly signaled that he intended to use the plea agreement to attack the witness's credibility.

The Ninth Circuit's decision in *United States* v. *Brown*, 720 F.2d 1059 (1983), similarly does not support petitioners' claim of conflict. The plea agreements in *Brown* included, in addition to the truthful testimony requirement, a provision whereby the cooperating witnesses agreed to submit to polygraph tests to be administered by the government. The prosecutor emphasized the polygraph provision in arguing that the jury should believe the testimony of the cooperating witnesses, and the court faulted the prosecutor for that reason. See 720 F.2d at 1072-1073. The court expressly noted that it was not addressing the issue, presented in this case, of the admissibility of the truthful testimony requirement in the absence of the polygraph provision (see *id.* at 1074).[2]

This case also is not in conflict with cases from the Second Circuit. That court, unlike most circuits, has held that the government ordinarily may not introduce into evidence the entire plea agreement during the government's direct examination of the cooperating witness; the court has adopted that rule because of its view that until the credibility of the witness has been challenged, the admission of the entire plea agreement "tends unduly to bolster a witness's credibility." *United States* v. *Smith*, 778 F.2d 925, 928 (1986); *United States* v. *Arroyo-Angulo*, 580 F.2d 1137, 1145-1147 (2d Cir.), cert. denied, 439 U.S. 913 (1978). The

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[2]Petitioners are plainly wrong in suggesting (Pet. 5-6) that the court of appeals' decision conflicts with decisions of the First and Third Circuits. Both the First and Third Circuits share the Fourth Circuit's view that district courts may admit the truthful testimony provision of a plea agreement on direct examination of a cooperating witness, in anticipation of defense challenges to the witness's credibility. See *United States* v. *McNeill*, 728 F.2d at 14; *United States* v. *Oxman*, 740 F.2d at 1303. The Fifth, Sixth, Seventh, and Eleventh Circuits also share the Fourth Circuit's view. See *United States* v. *Leslie*, 759 F.2d at 378; *United States* v. *Townsend*, 796 F.2d at 162-163; *United States* v. *Hedman*, 630 F.2d at 1198-1199; *United States* v. *Dennis*, 786 F.2d at 1045-1046.

Second Circuit, however, has permitted the government to introduce the witness's plea agreement on direct examination when the defense attacks the credibility of the witness in its opening statement, because in that circumstance it is clear that the defense will use the plea agreement in an effort to impeach the cooperating witness. See *United States* v. *Smith*, 778 F.2d at 928; *United States* v. *Jones*, 763 F.2d 518, 522 (2d Cir. 1985), cert. denied, No. 85-643 (Nov. 12, 1985); *United States* v. *Maniego*, 710 F.2d 24, 27 (2d Cir. 1983). The Fourth Circuit in this case expressly relied on the fact that petitioners' intention to use the plea agreements to impeach the witnesses was already "unmistakable" when the government conducted its direct examination of the three cooperating witnesses (Pet. App. 3a). Hence, the decision in this case is not inconsistent with the analysis in the Second Circuit cases.

Moreover, as the court of appeals found (Pet. App. 3a), petitioners in this case made "extensive" use of the plea agreements in cross-examining the witnesses. The Second Circuit has held that the admission of the entire plea agreement on direct examination is not reversible error where, as in this case, the defense subsequently challenges the credibility of the witness based on the plea agreement in cross-examination. See *United States* v. *Barnes*, 604 F.2d 121, 150-151 (1979), cert. denied, 446 U.S. 907 (1980); *United States* v. *Arroyo-Angulo*, 580 F.2d at 1147. Accordingly, while the Second Circuit has adopted a somewhat more restrictive rule governing the admissibility of plea agreements, that rule would not have resulted in reversal in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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